DEC 18 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-950

WOODROW MEGEL AND LOLA MEGEL,

Petitioners,

vs.

CITY OF PAPILLION, LYNN LANDGREN, MAYOR, AND ROBERT A. WALLACE, IDA MAE CHADWICH, LOUIS HAUSCHILD, JR., MAURICE MORAVEC, WILLIAM OLIVER, JR., FRANK ARNEY, FRANK SMITH, ALLEN RIBBE, COUNCILMEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

—o—

The Petitioners, Woodrow Megel and Lola Megel, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Nebraska rendered in this proceeding on May 11, 1973, and its denial on October 15, 1973 of Petitioners' Motion for Rehearing.

—o—

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska is reported in 59 SCJ. No. 7 at page 238 (Nebraska Supreme Court Journal Advance Sheets of Nebraska Reports) and is officially cited as 190 Neb. 238, 207 N. W. 2d 377. This opinion is set forth as Appendix A 3, p. 48, infra.

The final and binding Decree of the District Court of Sarpy County, Nebraska, part of which is not being enforced by the opinion of the Supreme Court of Nebraska, is set forth as Appendix A-1 and A 2, pp. 33, 47, infra.

JURISDICTION

The May 11, 1973 Opinion of the Supreme Court of Nebraska reverses the District Court of Sarpy County, Nebraska by holding that Respondents are in willful contempt of a final Decree entered January 7, 1971, which in part: *enjoined* Respondents from in any way causing or permitting any surface water in the drainage area to flow in, upon, against or through the property of Petitioners in a greater quantity than would have reached the property by natural drainage (which natural drainage paragraph 5 of the Decree found did not then injure, damage, or interfere with such property), and *ordered* Respondents "* * * *to construct or cause to be constructed within six months* * * * *suitable and appropriate facilities, improvements and outlets to cause the surface water* * * * *to be disposed of in a manner other than upon, in, against or through the property* * * *"of Petitioners*

in accordance with the provisions of the Decree. The natural drainage had been wrongfully and detrimentally changed by Respondents.

The Opinion of the Nebraska Supreme Court, however, unconstitutionally sustains the lower court in failing and refusing to enjoin Respondents from defeating, evading, nullifying and eliminating the Petitioners' vested rights as specified in the effective and binding Decree. The Opinion erroneously holds that Respondents, notwithstanding the Decree and their adjudicated willful contempt thereof, *may proceed in eminent domain* to acquire a drainage easement in and through the property of Petitioners for the purpose of enlarging and maintaining the ditch in Petitioners' property which the Decree of January 7, 1971 adjudicated was wrongfully caused by the wrongful drainage which the court decreed and ordered be discontinued by Respondents in the manner set forth in the Decree (pp. 6-7 infra, and App. A-1 and A-2, pp. 33, 47, infra).

Petitioners filed a timely motion for rehearing in which the infringement and deprivation of their adjudicated and vested rights, title, privileges and immunities under the Constitution of the United States were again set forth and claimed. Such motion was overruled October 15, 1973, and order staying mandate to January 15, 1974 was also entered (App. A-4 and A-5, pp. 55, 56, infra). This Petition for Certiorari is filed less than ninety days after date of such Order.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Where a final and binding Decree, duly adjudicated by a Nebraska court, in part *requires a city and its elected officials to construct, within six months* of the Decree, *suitable and appropriate facilities*, improvements and outlets so that the wrongful diversion and precipitation of surface waters, which have been causing damage to property of Petitioners, be disposed of in a manner other than upon, in, against or through the property of the Petitioners, may the Nebraska courts, and particularly the Nebraska Supreme Court, *not enforce the Decree in its entirety by permitting the City and its elected officials to proceed in eminent domain* to condemn an easement in and through the property of Petitioners for an enlarged ditch to continue such wrongful diversion and precipitation of surface waters *in contravention of the express requirements of the Decree?*

2. Does such opinion of the Nebraska Supreme Court as a partial defeasance of a prior final Decree violate the due process requirements of the Fourteenth and Fifth Amendments of the Constitution of the United States?

3. Does the Constitution of the United States, particularly by Sec. 1, Art. IV and the Fourteenth Amendment, require full faith and credit, in toto, by all Nebraska courts of a final Decree previously entered by a Nebraska court?

4. Does the Constitution of the United States, and particularly its due process requirements, permit the

Nebraska Supreme Court to avoid applying to the whole of a final Decree the established and fundamental laws which govern the binding effect of an adjudication previously entered?

5. As a part of constitutional due process, do the equal rights provisions of Sections 1981, 1982 and 1983 of Title 42 U. S. C. apply to Nebraska courts to prohibit nullification of a part of a binding and final Decree previously duly entered by a Nebraska court?

6. Where neither necessity nor public purpose applies in order to comply with the terms of a final Decree, may a city and its elected officials constitutionally proceed in eminent domain for an easement which does not permit compliance with the terms of the Decree, but which continues violation of the Decree?

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "• • • nor shall (any person) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners are residents and owners of real estate in Sarpy County, Nebraska. Their real estate abuts the City of Papillion. Respondents are the City of Papillion, its Mayor and Councilmen. Petitioners filed a suit in equity on November 19, 1962, in the District Court of Sarpy County, Nebraska, for appropriate action and relief pertaining to diversion and casting of surface waters and storm sewer waters into and upon the property of Petitioners causing damages to the property and creating a substantial ditch which continues to increase in size.

The Decree entered, after days of trial, on January 7, 1971, adjudicated and decreed that specified street and sewer constructions and installations by Respondents divert and precipitate large and unusual quantities of surface waters different from the natural drainage in a drainage area consisting of about 116 acres, and that the diversion and precipitation causes damage to Petitioners' property when the natural drainage did not injure, damage or interfere with Petitioners' property (Decree, App. A-1, p. 33, infra; pars. 5, 7, 10, pp. 36, 38, 39, infra).

In accordance with the adjudicated findings in the Decree, in part the Decree ordered Respondents, as Defendants, as follows:

> "A. * * * the defendants * * * be and they hereby are enjoined from in any way causing or permitting surface water from its streets, alleys and sewers presently and hereafter constructed and from any street, alley and sewer hereafter annexed within the drainage area in which the property of the plaintiffs is situated, to flow in, upon, through or against any of

the property of the plaintiffs, * * * in a greater quantity than what would have reached the property by natural drainage". (p. 41, infra).

"B. * * * defendants * * * be and they hereby are ordered to commence forthwith with an engineering study and preparation of the surveys, plans and specifications required in the construction of the facilities, improvements and outlets referred to in paragraph 11 of the findings herein and to construct or cause to be constructed within six months from the date of this Order suitable and appropriate facilities, improvements and outlets to cause the surface water aforesaid to be disposed of in a manner other than upon, in, against or through the property of the plaintiffs in a greater quantity than what would have reached the property by natural drainage and in a manner so that no damage be caused to the property of said plaintiffs and to said plaintiffs". (p. 42, infra).

"C. The provisions hereof inure to the benefit of the plaintiffs * * *, their personal representatives, heirs, successors and assigns, and to their above described real estate; and the provisions hereof shall be binding upon the defendants * * * their respective successors, and upon agents, employees and representatives acting for and in behalf of the City of Papillion and of any Mayor and member of the City Council of the City of Papillion". (p. 42, infra).

* * *

"E. The defendants * * * be and they hereby are ordered and required to construct or cause to be constructed the facilities, improvements and outlets referred to in paragraph B above within six months from the date of this Order". (p. 43, infra).

Pursuant to the laws of the State of Nebraska, and in particular pursuant to Sections 25-1301 and 25-1912, R. R. S. 1943 (App. B, p. 60, infra), the Decree of Janu-

ary 7, 1971 became a final judgment and determination, there having been no Appeal to the Supreme Court of Nebraska after motions for new trial were overruled. (p. 51, infra).

In the same action, on October 14, 1971, Petitioners filed Application in the District Court of Sarpy County, Nebraska, which entered the Decree, to have Respondents found in contempt of Court for not complying with the Decree. On December 20, 1971, Petitioners also filed therein an Application to Enjoin Respondents, in accordance with their resolution of November 16, 1971, from proceeding or undertaking in violation of the Decree to condemn a fifty foot wide drainage easement for proposed enlarged ditch through the Petitioners' property. Order of August 23, 1972 of the District Court denied both Applications of Petitioners, and as to such errors there was due and proper Appeal to the Nebraska Supreme Court by the Petitioners.

The adjudication of the Nebraska Supreme Court (pp. 48-54, infra) reverses the District Court in that the Nebraska Supreme Court adjudicates the Respondents guilty of willful contempt of the Decree of the Court; but, contrary to constitutional requirements, erroneously holds Respondents may proceed in eminent domain to acquire an easement in and through the Petitioners' property for the construction and maintenance of an enlarged ditch to continue the precipitation and casting of the wrongfully diverted surface and storm waters (in quantities wrongfully increased since entry of Decree) in, upon, through and against the property of the Petitioners notwithstanding the adjudicated and vested rights and duties of the

parties under the terms of the effective and binding Decree.

Motion for Rehearing was filed by Petitioners for the violation of constitutional provisions in holding that Respondents may proceed in eminent domain to abrogate, nullify, evade and eliminate the requirements and provisions of the final and effective Decree. Motion for Rehearing was denied (App. A-4, p. 55, infra).

The Decree of January 7, 1971, denied Petitioners any recovery as to specific damages (infra: par. 1, p. 35; par. 6, p. 37; par. 8, p. 38; par. 9, p. 39; par. F, p. 43). Such denial remains as vested rights of Respondents and vested detriments of Petitioners without the same abrogation or nullification which results to the adjudicated and vested rights of Petitioners if the determination of the Nebraska courts is not made to conform with the constitutional provisions and requirements of the United States. The Decree of January 7, 1971 also adjudicated that continuing damages result to the property of the Petitioners by the wrongful diversion of water from the constructions and installations of Respondents (par. 7, p. 38, infra). The Nebraska Supreme Court Opinion accordingly causes part of a final and binding Decree to be in effect as against Petitioners but unconstitutionally nullifies and voids other parts of the final and binding Decree as to Respondents.

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RAISING OF THE FEDERAL QUESTIONS

In the legal action in which the Decree of January 7, 1971 was entered, the Petitioners filed Applications for determination that Respondents were in contempt of the

Decree and to enjoin Respondents from violating the provisions of the Decree in proceeding pursuant to their Resolution to condemn an easement under the power of eminent domain (p. 52, infra). Such procedure by Petitioners conforms with Nebraska Constitutional and Statutory provisions (App. C, p. 61, infra) and was acted upon without any question as to procedure. Denial of relief under the Applications by the District Court of Sarpy County, Nebraska constituted the first unconstitutional judicial action and error which raised the Federal questions.

The Federal Constitutional questions were accordingly duly and promptly raised, by Petitioners herein, before the Nebraska Supreme Court in: Brief of Appellants, in their Motion for Rehearing and Brief in Support Thereof, in their Reply to Appellees' Resistance to Motion for Rehearing, and in their Application for Stay of Mandate. The Opinion of the Nebraska Supreme Court is silent on, and avoids any comment about, the constitutional questions. It merely reverses the lower court by adjudging Respondents to be in willful contempt of the Decree of January 7, 1971, but unconstitutionally holds Respondents are not enjoined from proceeding in eminent domain notwithstanding the explicit requirements of the final and binding Decree of which Respondents are in willful contempt.

———o———

REASONS FOR ALLOWING THE WRIT

Various constitutional requirements of due process and equal application of law, severally and jointly, apply hereto:

I. Adjudicated vested rights are constitutionally binding and protected.

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States protects adjudicated and vested rights which are binding upon the parties under the January 7, 1971 Decree. This Court and the Nebraska Supreme Court concur thereon:

> "*The power of the courts to vacate or modify their own judgments is limited.* * * * *The underlying basis* of our holdings in *Ziegenbein v. Damme,* supra, and like cases *is that rights have vested and are not therefore subject to modification.* The Legislature is subject to similar limitations *and the foundation is constitutional and lies in the due process clause of the Fourteenth Amendment to the Constitution of the United States.* Statutes may not operate retroactively so as to impair vested rights. *Travelers Ins. Co. v. Ohler,* 119 Neb. 121, 227 N. W. 449. This is the almost universal rule. *Hodges v. Snyder,* 261 U. S. 600, 43 S. Ct. 435, 67 L. Ed. 819; 16A C. J. S., *Constitutional Law,* § 417, p. 99; 2 *Sutherland, Statutory Construction* (4th Ed.), *Sands,* § 41.06, p. 268. *Private rights of parties which have vested by the judgment of a court cannot be taken away* by subsequent legislation, *but must be enforced by the courts* regardless of such legislation. Hodges v. Snyder, supra; Travelers Ins. Co. v. Ohler, supra. We have many times clearly recognized this principal. Mooney v. Drainage District, 134 Neb. 192, 278 N. W. 368.

See, also, 1 Black on Judgments (2d Ed.), § 298, p. 455; 1 Freeman on Judgments (5th Ed.), § 204, p. 395.

> "A legislative act will not be permitted, even if an intent so to do is clear, to operate retrospectively where it will have the effect of invalidating or impairing rights which have vested by virtue of the judgment of a court." (Emphasis added.)
>
> *Karrer v. Karrer*, 190 Neb. 610, 613-614, 211 N. W. 2d 116, 118-119, October 12, 1973.

The vested rights of Petitioners and the vested duties of Respondents under the Decree of January 7, 1971, require Respondents to construct facilities, improvements and outlets to cause the surface water involved to be disposed of in a manner other than in, upon, against, or through the property of Petitioners (pp. 6-7, supra). To permit Respondents to proceed in eminent domain for any ditch or continuation of the wrongful drainage in, through, upon or against Petitioners' property not only constitutes a modification of the vested rights under the Decree, but completely abrogates, voids and eliminates such vested rights and duties therein adjudicated and ordered. The Nebraska Supreme Court Opinion contravenes the above fundamental law of the land.

Furthermore, such unconstitutional elimination of vested rights and duties is here attempted by the Opinion of the Nebraska Supreme Court without purported benefit of any subsequent legislative act. The Opinion permits the provisions of the Decree to be ignored and unenforced by the Courts in Nebraska without basis in law or constitutional provisions. The applicable Due Process Clause forbids such and requires relief in this

Court to preserve the integrity and binding effect of any Court adjudication which is final. The adjudicated private rights of all persons, including Respondents, are to be enforced and preserved under the Fourteenth and Fifth Amendments (p. 5, supra). Law, order and justice are non-existent in Nebraska without the constitutional protection of this Court as to the error committed by the Nebraska Supreme Court. There is also denial of equal protection of laws by the Nebraska Supreme Court Opinion since it makes part of the final and binding Decree meaningless.

II. Defeasance of part of a Decree, absent provision therefor in the original Decree, is unconstitutional.

The Decree (App. A-1 and A-2, pp. 33, 47, infra, and pp. 6-7, supra) expressly and without limitations orders and directs Respondents to construct the specified facilities, improvements and outlets, even requiring them to do so within six months of the Decree. Subsequent to any applicable six months time, Respondents now would be given the right to ignore the provisions of the Decree if there not be reversal and constitutional protection by this Court.

The Decree of January 7, 1971 is devoid of any limitation, condition, or provision of defeasance to eliminate or excuse compliance therewith. The power of eminent domain for Respondents has long existed under Nebraska Laws; and Section 19-709, R. R. S. 1943 (App. D, p. 63, infra), relied upon by Respondents, establishes that the power of eminent domain existed as of and long prior to the commencement of this litigation and the entry of

the January 7, 1971 Decree herein. In the case of *Karrer v. Karrer,* supra p. 12, which applies the Due Process Clause of the Fourteenth Amendment, the Nebraska Supreme Court again ruled the law to be that:

> "* * * '*If the judgment* in this case *was intended to be subject to a defeasance* in case of the wife's remarriage, *it was necessary, since a vested right was involved, to have provided for such defeasance in the Decree.*' " (190 Neb. 610 at 612, 211 N. W. 2d 116, 118.) (Emphasis added.)

Any authority or provision to permit the defeat of the explicit, finally adjudicated mandates of the Decree of January 7, 1971 was required to have been specified therein. In the case of *Karrer v. Karrer,* supra, the decision shows statute existed under which the Decree entered could have provided for subsequent modification. In the same manner, the Decree in the present matter could have provided for exception or condition if eminent domain proceedings under then existing laws should be desired by Respondents. Not having so provided, the Decree is binding and vests rights and duties as entered, without power for this subsequent modification of a part of it (pp. 11-13, supra). Due process and equality by law require application of the above law of defeasance to the present opinion of the Nebraska Supreme Court.

The Decree of January 7, 1971 was entered by the court with knowledge of the Nebraska Statutes applicable to eminent domain, but without authorization therein of any avoidance or nullification of any part of it by use of any such existing statute. Upon the Decree becoming final in absence of appeal by any party, the rights and

duties vested so that no party may thereafter say the Decree was understood to be performed in a manner not specified therein. To permit such, as does the Nebraska Supreme Court Opinion, eliminates the judicial system of justice provided for in the Constitution, since no adjudication would now for certain vest any rights or duties. Since there is no defeasance or exception provided for in the Decree none can be supplied under the Constitution of the United States, and it is necessary and indispensable for this Court to preserve and enforce the judicially vested rights and duties in accordance with the constitutional requirements. Adjudications by Nebraska courts are now meaningless unless the present error is corrected by this Court.

III. Constitutionally the Decree must be enforced and upheld in toto, not partially only.

The Decree not only ordered Respondents to restore natural drainage by the construction of the appropriate facilities, improvements and outlets, but it also denied Petitioners specified damages sought by them (App.A-1: pars. 1, 6, F at pp. 35, 37, 43, infra, and p. 9, supra). Petitioners are bound by such denial, even though such denial was and is deemed erroneous by Petitioners as not applying Nebraska Law applicable to conduct which combines with acts of God in doing damage (App. E, p. 65, infra). Proceedings in eminent domain proposed by Respondents and the Nebraska Supreme Court do not permit Petitioners to obtain such specific damages denied them by the Decree (App. F, p. 66, infra, and p. 9, supra).

Due process now sought of this Court does not permit Respondents to proceed contrary to the Decree in their duty to construct the drainage improvements, facilities and outlets as ordered and at the same time preserve for them the benefits of the provisions in the Decree which are detrimental to Petitioners. Under the Decree, the Petitioners can restore their natural terrain when Respondents comply with the Decree. However, Respondents may proceed under the Nebraska Supreme Court Opinion to also prevent such restoration by proceeding to condemn a drainage easement in Petitioners' property for the purpose of enlarging the ditch already, as adjudicated and decreed, wrongfully caused by Respondents in Petitioners' property (pars. 4, 5, 7, pp. 36, 38, infra).

Such condemnation is not intended to nor will it, under the eminent domain provisions of the Statutes of Nebraska, provide any compensation for loss to Petitioners of the vested rights of Petitioners and the nullification of the duties of Respondents to construct improvements, facilities and outlets pursuant to the Decree for the restoration of the natural drainage so as not be in, against, upon or through the property of Petitioners and so as not thereafter to damage Petitioners' property. There is no proposal by or method for Respondents to compensate Petitioners for the elimination and nullification of their vested rights being deprived them by the Nebraska Supreme Court. Neither does the Nebraska Supreme Court grant Petitioners the specified damages denied them by the Decree to which they are bound but which Respondents are not bound, according to the here questioned Opinion of the Nebraska Supreme Court. Due

process and equal application of law require action by this Court.

IV. Due process and equality of laws bind litigants to the Decree entered.

Any proceedings by Respondents in eminent domain must be determined to be subject to the vested rights of the existing Decree:

> "Determination of issue by court having jurisdiction is conclusive in future litigation between parties until judgment is reversed." (Syl. 2)
>
> " 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.' "
>
> *Serpell-Winner-Jordan, Inc. v. Crete Mills*, 8th C. C. A., 51 F. 2d 1028, 1030.
>
> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." (Syl. 7)
>
> *Baldwin v. Iowa State Travelling Men's Association*, 283 U. S. 522, 51 Sup. Ct. 517, 75 L. Ed. 1244.

Without writ of certiorari by this Court the constitutionally vested rights of Petitioners are wrongfully voided and annulled insofar as Nebraska Courts are concerned, and the adjudicated matters are not constitutionally settled forever.

In the case of *State ex rel. Southeast Rural Fire P. Dist. v. Grossman,* 188 Neb. 424, 429, 197 N. W. 2d 398, Syl. 3, the Nebraska Supreme Court states the rule, not applied in the present opinion, that a judgment is conclusive "not only to matters actually determined, but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in the final judgment, whether formerly raised or not." Respondents did not obtain provisions in the Decree to permit them to proceed under the existing laws pertaining to eminent domain. They could have sought such provision if they desired it. Not having obtained such right as to existing law, the Respondents cannot constitutionally avoid the terms of the Decree by proceeding in eminent domain. It is also the law of Nebraska that any proceeding seeking relief other than previously adjudicated, even when the overturning of the prior adjudication may be important or necessary to its success, is a collateral attack on the prior adjudication (*Cacek v. Munson,* 160 Neb. 187 (Syl. 4), 69 N. W. 2d 692). Likewise the Nebraska court did not equally and uniformly apply such rules in its decision.

Since the decision in *Gregory v. Kenyon* of May 18, 1892, 34 Neb. 640, 649, 52 N. W. 685, 687, the rule of law in Nebraska has been that a former judgment may be put

in issue in subsequent proceedings, and the prior "adjudication thereon is binding and conclusive and cannot be questioned collaterally." Under due process and equal application of laws there can be no collateral proceedings in eminent domain by Respondents while the binding Decree of January 7, 1971 exists. However, equal application of laws and due process must come from this Court.

V. Full faith and credit to the Decree is required as due process and equal application of laws.

Section 1, Article IV of the Constitution of the United States requires that "Full Faith and Credit shall be given in each State to the * * * judicial Proceedings of every other State." There is no due process in Nebraska under the Constitution of the United States if the courts of Nebraska must give full faith and credit to adjudications from other States but ignore and avoid the final adjudications entered within Nebraska as demonstrated by the opinion presently in issue. Without action by this Court such anomaly now exists in the United States under the opinion of the Nebraska Supreme Court which does not provide for full faith and credit to the adjudication duly made by a Nebraska court. Due process of the Fourteenth Amendment necessarily embodies within it the full faith and credit requirements applicable to binding Decrees duly entered within a State.

VI. Constitutional administration of justice is here necessary by this Court to avoid continuing litigation, travesty upon justice, and trifling with judgments duly entered.

Application of each of the Federal constitutional provisions may be eradicated and eliminated in the State of Nebraska unless the precedent in the Opinion in question is corrected by this Court.

Law, order and justice, as the sound jurisprudential system of our nation under the due process requirements, also avoids continuing litigation as to vested rights determined by a Decree. Any proceedings in eminent domain for an easement constitutes constitutionally wrongful continuation of litigation contrary to the duties specified in the Decree. The willful violation of the Decree by Respondents, which is adjudicated by the Nebraska Supreme Court Opinion to here exist, is accordingly to continue with sanction of the Nebraska Supreme Court if not corrected by this Court. Unless this Court applies and enforces the constitutionally vested rights of persons such as presently are involved, due process of justice and law and order are absent under the judiciary in Nebraska.

> "Furthermore, it is fundamental that federal courts, in common with other courts, have inherent power to do all things that are reasonably necessary *for the administration of justice*, within the scope of their jurisdiction. Strohbar v. Dwinnel, 5 Cir., 29 F. 2d 915, 916. See also Adams v. United States ex rel. McCann, 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435." (193 F. 2d at 96.) (Emphasis added.)
>
> *United States v. Field, et al.*, 193 F. 2d 92, 96, U. S. C. A. 2d Cir., Cert. denied 96 L. Ed. 670, 72 S. Ct. 202, 342 U. S. 894.

The law of Nebraska herein applicable, as demonstrated in the case of *Heppe v. State*, 162 Neb. 403 (Syl. 1 & 2), 76 N. W. 2d 255, is that the Nebraska Supreme Court must reach an independent decision without being influenced by error of the lower court. Accordingly, the Nebraska Supreme Court was bound, the same as this Court, to apply the constitutional requirements to the Decree of January 7, 1971 notwithstanding any error by the lower court. It did not do so, and compounded error and constitutional violations. The rules of equal application of law and equality of vested rights also required the Nebraska Supreme Court to apply herein the established rule of independent decision by it, but it also constitutionally erred in not doing so.

Without action by this Court the wrongful and anarchical local government will be permitted to utilize its wrongful diversion and precipitation of surface waters as a basis for continuation and enlargement of such diversion, rather than being required to correct its wrongful conduct as ordered in the Decree. The provisions and jurisprudence of the Constitution do not permit Respondents as local government to profit by their own wrongs so as to perpetuate the wrongful diversion ordered corrected by the Decree, but permitted to be worsened under the opinion of the Nebraska Supreme Court. Re-litigation of the vested duties prescribed in the Decree is not constitutionally permissible in another proceeding, such as by condemnation under eminent domain presently contemplated by Respondents. In the case of *Cover v. Platte Valley Public Power & Irr. Dist.*, 162 Neb. 146, 154, 75 N. W. 2d 661, 668, it was held it "would be a

travesty upon justice and permit a trifling with judgments duly rendered according to law" if a prior adjudication could again be determined. Such travesty, trifling and absence of due process presently exist in the absence of appropriate determination by this Court.

A primary vested right of Petitioners and a primary vested duty of Respondents adjudicated by the Decree requires construction by Respondents of the facilities, improvements and outlets so the surface waters are not cast and precipitated in, through, upon or against the property of Petitioners. Any purported proceedings by Respondents in eminent domain is for the purpose of unconstitutionally nullifying and abrogating such primary right and primary duty.

> "This court recently had the occasion to discuss the test of sameness of causes of action and the following test was applied:
>
> "' ' ' The primary test for comparing causes of action has long been whether or not the primary right and duty, and the delict or wrong combined are the same in each action. Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069 * * *.' ' Engelhardt v. Bell & Howell Co., 8 Cir., 327 F. 2d 30, 32."
>
> *Rhodes v. Meyer,* 334 F. 2d 709, 712 (8th Cir.) (cert. den. 379 U. S. 915, 13 L. Ed. 2d 186, 85 S. Ct. 263; 383 U. S. 971, 16 L. Ed. 2d 311, 86 S. Ct. 1282).

This further establishes there would be continuing litigation and trifling with the binding and final Decree here involved, which is also termed a travesty upon justice. Due process does not permit such.

Pronouncements of fundamental law by this Court in the case of *Fuentes v. Shevin*, 407 U. S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, also may seem applicable to confirm the necessity of action by this Court in this present matter.

> "It is equally fundamental that the right of notice and opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U. S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187." (407 U. S. at p. 80, 32 L. Ed. 2d at p. 570)
>
> "The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearing 'at a meaningful time.' • • •" (407 U. S. at p. 80, 32 L. Ed. 2d at p. 570)
>
> • • •
>
> "• • • But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' *Stanley v. Illinois*, 405 U. S. 656, 647, 31 L. Ed. 2d 551, 556, 92 S. Ct. 1208." (407 U. S. at p. 82, 32 L. Ed. 2d at p. 570)

The Opinion of the Nebraska Supreme Court is not constitutionally "meaningful" and is "defective" within the above rules in holding that willful contempt of the Decree by Respondents does here exist and then holding that Respondents may proceed in eminent domain in nullification and contravention of their vested and adjudicated duties to construct the facilities, improvements and outlets as specified in the Decree. This is no "mean-

ingful'' final Decree if part of it is to be ignored by the Nebraska courts. The Opinion of the Nebraska Supreme Court is also not within the above stated damage allowance requirements of due process in that nullification of the vested rights of Petitioners and duties of Respondents, regarding the decreed construction to restore proper drainage outside the property of Petitioners, is here without any award of damage being made available, and even if there were a subsequent possibility of award of damage, as above stated, such would not constitute due process for the vested and adjudicated rights being nullified by the Nebraska Supreme Court. To act contrary to the binding Decree is a wrong which cannot be undone, whereas this Court does not permit a wrong even "if it can be undone". Judicial integrity and reliability under the Constitution are wanting in Nebraska if the Nebraska Supreme Court Opinion is not now corrected herein.

VII. Eminent domain is unconstitutionally used when not necessary, when not for public purpose, or when constituting excess condemnation.

The proposed eminent domain proceeding not enjoined by the Nebraska Supreme Court violates the requirements of the Constitution of the United States, and particularly its Fourteenth Amendment.

Condemnation by Respondents of an easement in Petitioners' property is not possible without abrogating and nullifying the pertinent Decree provisions which vests the rights of Petitioners and duties of Respondents (pp. 6-7, 11-15, supra; App. A-1, p. 33, infra). The law of Ne-

braska has been that the power of eminent domain must be conferred by Statute and is a power in derogation of common right, with the Statutes conferring such power being strictly construed in favor of the landowner (*Heppe v. State,* 162 Neb. 403, 408, 76 N. W. 2d 255, 259, and *Higgins v. Loup River Public Power Dist.,* 157 Neb. 652, 659, 61 N. W. 2d 213, 217).

Regarding use of eminent domain herein by Respondents for storm water sewers, Sec. 19-709, R. S. Supp. 1972 provides, as it did when the Decree was entered, for the power of eminent domain: "* * * *When necessary* for the proper construction of any of the works above provided, * * *." (Emphasis supplied), (App. D, p. 63, infra). The constitutional *necessity* here involved is for the City of Papillion, its Mayor and Councilmen, as Respondents, to conform with their duties specified in the Decree, and there is no necessity or need whatsoever for condemnation of any proposed easement in and through Petitioners' property for the purpose of constructing facilities, improvements and outlets as Decreed "to cause the surface water * * * to be disposed of in a manner other than upon, in, against or through the property of" Petitioners. It is left only to this Court to provide law, order and justice in Nebraska under the Opinion here in question.

Additionally, this Court and other courts hold that condemnation of property must be for *public purposes.* Compliance by Respondents with the Decree requires no proceedings under eminent domain as to the property of the Petitioners, and accordingly there is no public pur-

pose to be served by the proposed condemnation in eminent domain. This Court adheres to the due process requirements of public purpose as basis for proceedings in eminent domain, as is demonstrated in its ruling that excess condemnation by a city is not a public purpose:

> "* * * It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property, the question *what is a public use is a judicial one.* In deciding such a question, the court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the *question remains a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution.* In the present instance, we have no legislative declaration, apart from the statement of the city council, and no judgment of the state court as to the particular matter before us. Under the provision of the Constitution of Ohio for excess condemnation when a city acquires property for public use, it would seem to be clear that *a mere statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital.* This would be to treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted. * * *." (Emphasis added.)
>
> *Cincinnati v. Vester*, 281 U. S. 439, 446-447, 50 S. Ct. 360, 74 L. Ed. 950, 955.

Any acquisition by Respondents of an easement in Petitioners' property would not only constitute excess condemnation but also constant and continuing violations of the binding Decree in that the wrongfully diverted surface waters would continue to be precipitated and cast into, upon, against and through the property of the Petitioners. Such is further demonstrated by the fact that an easement is a liberty, privilege or advantage in property which remains the property of Petitioners. Due process is lacking where the vested judicial rights and duties are to be constantly and continuously violated. Due process is also violated since there is neither public purpose nor necessity for such easement in order to comply with the Decree, and such easement would clearly constitute excess condemnation adjudged to be unconstitutional.

VIII. Due process embodies federal statutory provisions for equal rights.

Failure and refusal of the Nebraska Supreme Court to provide enforcement of the Decree, as it vests the rights and duties, additionally deprives Petitioners of full and equal benefit of all laws and of vested rights, and also discriminates against them by nullifying parts of a binding Decree. It is submitted the Nebraska Supreme Court Opinion violates Sections 1981, 1982 and 1983 of Title 42 U. S. C. (App. G, p. 67, infra) which provide a part of the constitutional guarantees of due process. Such violations are also reviewable by this Court as specified in Section 1984 of Title 42 U. S. C. (App. G, p. 67, infra).

The equal rights provisions of the Civil Rights Statutes of the United States, which are a part of due process, now are not applied in Nebraska when the Nebraska Supreme Court Opinion refuses to enjoin action which nullifies the duties specified in a binding Decree requiring construction by Respondents of facilities, improvements and outlets so the waters shall not be cast and precipitated into, upon, through, or against the property of the Petitioners. Such statutory due process of rights accordingly also do not apply in Nebraska unless jurisdiction is here taken by this Court.

> "A showing of cause for not performing a duty required by a final judgment of a court is that the party obligated to perform it has promptly, diligently, and as effectually as the situation permits attempted to perform it but has been prevented by something beyond his control." (Syl. 10)
>
> *Noble v. City of Lincoln*, 158 Neb. 457 (Syl. 10), 63 N. W. 2d 475 (Syl. 12).

Whether Respondents do or do not proceed in eminent domain is within their control, and accordingly the Nebraska courts are also acting unconstitutionally in not equally and uniformly applying said law of the State of Nebraska in purporting to permit proceedings in eminent domain in contravention of a binding Decree.

IX. The Opinion's partial non-enforcement of the Decree is non-observance of Law and constitutes anarchy not constitutionally permissible in the United States.

In the case of *Dombrowski v. Pfister*, 380 U. S. 479, 484, 14 L. Ed. 2d 22, 27, 85 S. Ct. 1116, this Court held:

"It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court. * * *." In raising constitutional question, Petitioners should accordingly assume that the Nebraska Supreme Court would not violate the applicable constitutional provisions here involved. Instead, its opinion evades all constitutional requirements. The failure of the Nebraska Supreme Court to enforce the vested judicial rights of Petitioners is so extreme in eliminating constitutional rights and contravening the constitutional jurisprudential system of the United States that action by this Court is imperative for the maintenance of law, order and justice throughout the United States, and particularly in Nebraska.

Contamination of due process spreads if not stopped. The Nebraska Supreme Court Opinion eliminates judicial recourse in Nebraska courts for persons such as Petitioners who have judicially vested rights, and thereby establishes lawlessness, contempt for law and anarchy which this Court does not permit under the Constitution of the United States:

> *"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."* (Emphasis added.)

Olmstead v. United States, 277 U. S. 438, 485-486, 72 L. Ed. 944, 959-960, 48 S. Ct. 564. (From dissent of Mr. Justice Brandeis.)

"• • • But there is another consideration—*the imperative of judicial integrity.* It was of this that Mr. Justice Holmes and Mr. Justice Brandeis so eloquently spoke in Olmstead v. United States, 277 U. S. 438, at 469, 471, 72 L. Ed. 944, 952, 953, 48 S. Ct. 564, 66 A. L. R. 376, more than 30 years ago. '• • • In a government of laws,' said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy'." (Emphasis added.)

Elkins v. United States, 364 U. S. 206, 222, 4 L. Ed. 2d 1669, 1680-1681, 80 S. Ct. 1437.

In the case of *White v. Longo,* 190 Neb. 703, 707, — N. W. 2d —, November 9, 1973, the Nebraska Supreme Court accepts the principle of "imperative of judicial integrity". However, such is lacking in its opinion now before this Court by its failure to enjoin proceedings which nullify and contravene the final Decree of January 7, 1971.

The adjudicated and vested duties of Respondents, as a city and its elected officials, must be complied with by Respondents or anarchy exists in accordance with the above and other judicial pronouncements. The judicial status created by the Nebraska Supreme Court Opinion is devoid of due process.

CONCLUSION

Each foregoing reason establishes the imperative and essential necessity for consideration and determination of this matter by this Honorable Court so that the requirements and provisions of the Constitution of the United States be continued as binding upon the Nebraska courts and upon local government in Nebraska. Unconstitutional use of eminent domain which is not permitted by this Court is judicially approved in Nebraska in the absence of proper action herein by this Court.

Absence of constitutional government through the judiciary is the status in Nebraska under the Opinion here requiring the judgment and decision of this Honorable Court.

Writ of certiorari to the Nebraska Supreme Court is accordingly here applicable and most urgently necessary, and prayer for its issuance is hereby submitted together with prayer for such other and further action by this Honorable Court as is appropriate.

Respectfully submitted,

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APPENDIX A

(Transcript, Nebraska Supreme Court)

MEGEL v. CITY OF PAPILLION NO. 38776

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Be it remembered that on the 17th day of October 1972, there was filed in the office of the Clerk of the Supreme Court of Nebraska a certain TRANSCRIPT, such parts of said TRANSCRIPT as are mentioned and described in the praecipe for this record being in the words and figures following, to wit:*

* (End of p. 1, Transcript)

APPENDIX A-1

(January 7, 1971 Decree, District Court of Sarpy County, Nebraska)

In The District Court of Sarpy County, Nebraska

WOODROW MEGEL, et al.,

Plaintiffs,

vs.

CITY OF PAPILLION, et al.,

Defendants.

CITY OF PAPILLION, In the State of Nebraska, a Corporation,

Plaintiff.

vs.

WOODROW W. MEGEL, et al.,

Defendants.

MEMORANDUM AND DECREE

Case No. 8326

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MEMORANDUM AND DECREE

Case No. 8720

The above entitled actions having been duly consolidated for trial, the same came on for trial upon the pleadings and amendments to pleadings filed and made before and during trial, trial having been held on March 17, 18, 19, 27 and 28, 1969, and on May 28 and 29, 1969, and on June 19, 1969. The premises were viewed and inspected by the Court, with consent of counsel on each

occasion, in the morning of March 17, 1969, in the presence of counsel, at noon on March 17, 1969 by the Court alone, and on June 24, 1969 by the Court alone. Woodrow Megel and Lola Megel as plaintiffs in Case No. 8326 and as defendants in Case No. 8720 were represented by Bernard E. Vinardi as their attorney, and the City of Papillion and its Mayor and individual members of the Council of the City of Papillion were represented by Dale Kirby as their attorney during trial and final argument and now being represented by Eugene T. Atkinson as their attorney. Final arguments were made for said parties* on June 25, 1969 by Bernard E. Vinardi and Dale Kirby as the respective attorneys and counsel for Megels submitted a memorandum brief to the Court on said date and counsel for the City was granted 30 days from said date to file answer brief. Although further extensions were granted by the Court to counsel for the City to file brief, no brief was received from counsel for the City and in April, 1970 the Court was advised by the then City Attorney, Eugene T. Atkinson, that no brief would be filed and that the matter could be considered by the Court as submitted.

In determining any questions of fact presented in this case this Court must be governed by the competent evidence introduced and to these facts must be applied the law relative thereto and this Court cannot indulge in speculations, conjectures or inferences not supported by competent evidence. No attempt will be made to review the evidence in this case in this Memorandum and Decree; suffice to say that this Court has throughly studied and considered the record of the evidence and the law applicable thereto.

* (End of p. 2, Transcript)

The Court having taken said matters under advisement and now being fully advised in the premises finds as follows:

1. Generally in favor of Woodrow Megel and Lola Megel as plaintiffs in Case No. 8326 and as defendants in Case No. 8720 and against the City of Papillion and its mayor and the council members of the City of Papillion in Case No. 8326 as defendants and against the City of Papillion as plaintiff in Case No. 8720, except as to insufficient proof of dollar amount of damages as hereinafter set forth in paragraphs 6 and 8 and except for damages for alleged changes in Papillion Creek as hereinafter set forth in paragraph 9 and that in each action the Court has jurisdiction of the subject matter and of the parties.*

2. That the plaintiffs in Case No. 8326, being defendants in Case No. 8720, are and for many years have been the owners of the real estate legally described as Tax Lots 7 and 8, in the Northeast Quarter of Section 27, Township 14, North Range 12, East of the 6th P. M. in Sarpy County, Nebraska; that said real estate was acquired by Wendell Megel, father of Woodrow Megel, a party in these actions, originally by conveyance of October 9, 1890, and that he conveyed away Tax Lot 7 by conveyance of July 8, 1896 and reacquired said Tax Lot 7 by Deed of April 20, 1912, and at all times since all of the aforesaid real estate has been owned by him or his family, with conveyance of said Tax Lots 7 and 8 aforesaid having been conveyed by the other members of the family to Woodrow W. Megel, a plaintiff in Case No. 8326, by deed of December 26, 1933, who since then has continued

* (End of p. 3, Transcript)

to own said real estate in part by himself and in part with his wife, Lola Megel, also a plaintiff in Case No. 8326.

3. That the City of Papillion at the time said actions were filed and tried was a City of the Second Class in Sarpy County, Nebraska, under the laws of the State of Nebraska and that defendants joined with the City of Papillion as defendants in Case No. 8326 are its Mayor and Council members of the City of Papillion.

4. That a municipal corporation has the right to pave its streets and improve and provide for the drainage of its streets; but if in so doing it causes an increased flow of surface water upon or against private property, and negligently fails to provide a sufficient outlet for the escape of water thus brought upon or against such property, it will be liable to the owner thereof for any damage that may result from such negligence; that a city cannot collect and throw upon the land of another increased quantities of water that would not otherwise have found its way there.*

5. That previous to the hereinafter specified street and sewer construction and installation by the City of Papillion, the surface water drainage to and upon the aforesaid property of the plaintiffs in Case No. 8326 or any part thereof did not injure or damage any of said property of the plaintiffs and the same did not interfere with the plaintiffs in Case No. 8326 and their said property; that during the period of 1950 to 1962, inclusive, the City of Papillion and its Mayor and City Council did grade, pave and curb concrete streets and alleys stipu-

* (End of p. 4, Transcript)

lated to as shown by Exhibits 3 and 4, copies of which are attached hereto and made a part hereof, and constructed and installed certain sewer and drainage facilities pertaining thereto; that as a result thereof, the aforesaid surface water in the pertinent drainage area has been discharged in a substantially different manner and in substantially larger quantities from its natural course and places where it naturally went, and such water has been and is gathered in large and unusual quantities and precipitated upon the property of the plaintiffs in Case No. 8326; that the defendants in Case No. 8326 have failed to provide a sufficient outlet for the escape of such water without so precipitating it upon the property of the plaintiffs in Case No. 8326; that said construction and installation by the City of Papillion has and does collect and discharge such surface water upon the property of the plaintiffs in Case No. 8326 in a greater quantity and flow than would have reached such property by natural drainage; that it is and has been the duty of the defendants in Case No. 8326 to use ordinary care and all reasonable means to take care of the water it had accumulated and is accumulating so as not to injure or damage the property of the plaintiffs in Case No. 8326 or interfere with said plaintiffs and their property; that the defendants in Case No. 8326 failed to make reasonable provision to carry such water to a point* where it would do no damage to the property of the plaintiffs in Case No. 8326.

6. That the evidence is insufficient for determination by the Court with any degree of accuracy the dollar amount of damages to the Plaintiffs in Case No. 8326 heretofore caused by such precipitation of surface water upon their

* (End of p. 5, Transcript)

property prior to the heavy rains of June 16, 1964 and that the evidence relative to the dollar amount of damages of said plaintiffs was too conjectural, uncertain, speculative and remote and was not proved with reasonable certainty.

7. That competent evidence in behalf of plaintiffs in Case No. 8326 does establish that the plaintiffs did sustain some continuing damages by surface water as the result of the said construction and installation by and in behalf of the defendants in Case No. 8326 during the period of 1950 to 1962 inclusive; that under such circumstances injunction is a proper remedy because equity looks to the nature of the continuing damages inflicted rather than to the magnitude of the damages inflicted as a ground of affording relief.

8. That the rain on June 16, 1964, which damaged the property and residence of the plaintiffs in Case No. 8326, the residence being known as 314 West Lincoln Street, was unusual and excessive to an extent not necessarily to be anticipated when the paving and sewer system was planned and constructed, and that the conditions which caused the damage to the plaintiffs by said heavy rain were unusual, extraordinary, and foreseeable[1]; that the disasterous flood was caused by the precipitation of rain over which the defendants had no control and was of such unprecedented volume that the defendants could not, in the exercise of ordinary prudence, reasonably be expected to anticipate it; that regarding the damage sustained in said rain, the plaintiffs in Case No. 8326 have failed to establish by a* preponderance of the evidence that the

1 (See App. A-2, at pp. 47-48, infra: "not foreseeable".)

* (End of p. 6, Transcript)

acts of omission or commission of the defendants therein were the proximate cause or a proximately contributing cause of the damages to the property and residence sustained by the plaintiffs in Case No. 8326 as a result of the June 16, 1964 heavy rain, which the court concludes the defendants are not liable for.

9. That plaintiffs have failed to meet the burden of proof to establish by a preponderance of the evidence the allegations in Paragraph IX of the Petition in Case No. 8326 pertaining to alleged acts of the defendants relative to Papillion Creek, also known as Papio Creek.

10. That the drainage area here involved consists of about 116 acres, is outlined in red in the plat, which is Exhibit 2 in evidence, and may generally be described as an area extending from Lincoln Street on the north to County Road or Crest Road or Greunther Road on the south, and from Jackson Street on the east to a distance of about 1,100 feet, more or less, west of Polk Street as measured by an extension west of Sheridan Street.

11. That in Case No. 8326, the defendants should be enjoined from in any way causing or permitting surface water from its streets, alleys, and sewers presently and hereafter constructed, and from any street, alley and sewer hereafter annexed, in said drainage area in which the property of the plaintiffs is located, to flow in, upon, through or against any of the above described property of the plaintiffs in Case No. 8326 in a greater quantity than what would have reached the property by natural drainage, and said defendants should be ordered to construct or cause to be constructed suitable and appropriate

facilities, improvements and outlets to cause the surface water to be disposed of in a manner other than upon, in or through the property of the plaintiffs in Case No. 8326 and in* a manner so that no damage be caused to the property of said plaintiffs and to the said plaintiffs in Case No. 8326.

12. That Case No. 8720 by the City of Papillion for annexation of a part of the property of the plaintiffs should be dismissed with prejudice and such annexation denied for want of proof as required by law and want of compliance with applicable law.

13. That the costs should be taxed upon the City of Papillion and the other defendants in Case No. 8326 and upon the City of Papillion in Case No. 8720.

14. That the defendants in Case No. 8326 should be ordered and required to commence forthwith with an engineering study and preparation of the surveys, plans and specifications required in the construction of the facilities, improvements and outlets referred to in paragraph 11 above and that said defendants should be ordered and required to construct or cause to be constructed the facilities, improvements and outlets referred to in paragraph 11 above within six months from the date of this Order.

15. That the City of Papillion, its Mayor and members of the City Council should be ordered to cease and desist without delay from in any way causing or permitting the surface water aforesaid to flow in, upon, against, or through the aforesaid property of the plain-

* (End of p. 7, Transcript)

tiffs in Case No. 8326 in a greater quantity than what would have reached the property by natural drainage, and to take effective action appropriate or necessary to so cease and desist.

16. That this Decree should inure to the benefit of the plaintiffs in Case No. 8326 their personal representatives, heirs, successors and asigns, and to their above described real estate; and the provisions hereof should be made binding upon the City of Papililon, its Mayor and members of the City Council who are* defendants herein and the successors of the Mayor and members of the City Council of said City, and upon any successors of the City of Papillion, and upon its agents, employees and representatives acting for and in behalf of the City of Papillion and of any Mayor and members of the City Council of the City of Papillion.

IT IS THEREFORE ADJUDGED, ORDERED AND DECREED as follows:

A. In Case No. 8326, the defendants in Case No. 8326 be and they hereby are enjoined from in any way causing or permitting surface water from its streets, alleys and sewers presently and hereafter constructed and from any street, alley and sewer hereafter annexed within the drainage area in which the property of the plaintiffs is situated, to flow in, upon, through or against any of the property of the plaintiffs, which property is legally described as tax Lots 7 and 8 in the North East quarter of Section 27, Township 14, North Range 12, East of the 6th P. M. in Sarpy County, Nebraska, in a greater quantity than what

* (End of p. 8, Transcript)

would have reached the property by natural drainage.

B. That defendants in Case No. 8326 be and they hereby are ordered to commence forthwith with an engineering study and preparation of the surveys, plans and specifications required in the construction of the facilities, improvements and outlets referred to in paragraph 11 of the findings herein and to construct or cause to be constructed within six months from the date of this Order suitable and appropriate facilities, improvements and outlets to cause the surface water aforesaid to be disposed of in a manner other than upon, in, against or through the property of the plaintiffs in a greater quantity than what would have reached the property by natural drainage and in a manner so that no* damage be caused to the property of said plaintiffs and to said plaintiffs.

C. The provisions hereof inure to the benefit of the plaintiffs in Case No. 8326, their personal representatives, heirs, successors and assigns, and to their above described real estate; and the provisions hereof shall be binding upon the defendants in Case No. 8326 their respective successors, and upon the agents, employees and representatives acting for and in behalf of the City of Papillion and of any Mayor and member of the City Council of the City of Papillion.

D. Case No. 8720 by the City of Papillion for annexation of a part of the property of the defendants in said case No. 8720 be and the same hereby is dismissed with prejudice.

* (End of p. 9, Transcript)

E. The defendants in Case No. 8326 be and they hereby are ordered and required to construct or cause to be constructed the facilities, improvements and outlets referred to in paragraph B above within six months from the date of this Order.

F. That no dollar amount of damages to plaintiffs in Case No. 8326 be awarded to said plaintiffs as said plaintiffs have failed to establish by a preponderance of the evidence that the acts of omission or commission of the defendants in Case No. 8326 were the proximate cause or a proximately contributing cause of the damages to the property and residence sustained by the plaintiffs in Case No. 8326 as a result of the June 16, 1964 heavy rain and that plaintiffs have failed to meet the burden of proof to establish by a preponderance of the evidence the allegations in paragraph 9 of the Petition in Case No. 8326 pertaining to alleged acts of the defendants relative to Papillion Creek, also known as Papio Creek.*

G. That the costs in Case No. 8326 be and the same hereby are taxed to the defendants and the costs in Case No. 8720 be and the same hereby are taxed to the City of Papillion.

Dated at Papillion, Nebraska, this 7th day of January, 1971.

BY THE COURT:

/s/ Walter H. Smith, District Judge.**

* (End of p. 10, Transcript)

** (End p. 11, Transcript)

EXHIBIT 3

(Of January 7, 1971 Decree above)

Year Paved	Papillion District Number	Street	
1950	5	Jackson St.	—Patton St. to Lincoln St.
1956	34	Jackson St.	—Patton St. to Crest St.
1956	18	Madison St.	—Lincoln to Sherman
1954	8	Madison St.	—Sherman to No. line of Dist. #60
1959	60	Madison St.	—So. Line Dist. #8 to County Road (Greunther St.)
1956	26	Harrison St.	—Lincoln to Sheridan St.
1956	26	Harrison St.	—Sheridan St. to Perry
1958	52	Harrison St.	—Perry to County Road (Greunther St.)
1962	92	Polk St.	—Lincoln to Perry St.
1959	Sec. 1	Polk St.	—Perry to West Crest Road (Sec. 1 of contract which also included paving of West Crest Road from Polk St. to County Road, now Greunther St.—see ** below)
1956	34	Crest Road	—Madison to Jackson
1961	74	County Road (now Greunther St.)	—Harrison to Madison
1961	72	Perry St.	—Harrison to Madison
1959	63	Perry St.	—Harrison to Polk
1957	43	Halleck St.	—Harrison to Jackson (on to Washington
1961	71	Sheridan St.	—Harrison to Madison
1951	13	Sheridan St.	—Madison to Jackson
1958	51	Sherman St.	—Harrison to Jackson
1956	29	Sherman St.	—Harrison to Polk

EXHIBIT 3

(Of January 7, 1971 Decree above, continued)

Year Paved	Papillion District Number	Street	
1956	24	Grant St.	—Madison to Jackson
1961	82	Grant St.	—Madison to Harrison
1961	68	Lincoln St.	—Jackson St. to East line of Tax Lot 7
		Paving is 30.6 feet wide (face to face front of curb)	

1959** Privately paved — West Crest Road—Polk St. to County Road (Greunther St.) along with Sec. 1 of Polk St., above, with City of Papillion approval, in accordance with City of Papillion plans and specifications; City of Papillion Engineers set stakes, inspected construction, and City of Papillion held funds in escrow to pay for same on completion, and City of Papillion Engineers reported to City of Papillion construction conformed with plans and specifications.

Basic street widths, each street, are 24 ft. from back of curb to back of curb. Some streets have been widened by City of Papillion for parking. No street is narrower than 24 feet. Each street is constructed of Portland Cement Concrete paving, being 5 inches thick reinforced paving. Each paved street as constructed has Class E curbs (one on each side), being a curb 6 inches high and 12 inches from back of curb to gutter, gutter being where water flows on pavement.

EXHIBIT 3

(Of January 7, 1971 Decree above, continued)

The basic standards and specifications are the same as to each street.

1956 as part of Dist. 24, South 88 feet of North-South Alley from Grant St. to Lincoln St. between Madison St. and Jackson St. paved by City of Papillion.*

EXHIBIT 4

(Of January 7, 1971 Decree, above)

1. Henningson, Durham and Richardson, Consulting Engineers and Architects, Omaha, Nebraska, now are and at all times pertinent have been the Engineers for the City of Papillion regarding and pertaining to: paving, grading and curbing of Streets, and sanitary and storm sewers. It has been so since 1947, inclusive.
2. Drainage area pertaining hereto contains about 116 acres.
3. The grading, paving and curbing of the streets paved in that drainage district was done by the City of Papillion except as noted of West Crest Road from Polk St. to County Road (now Greunther St.).
4. The portion of West Crest Road from the South line of Polk Street to The South boundary of the drainage district or area here involved on West Crest St. was annexed by the City of Papillion by Ord. No. 437 of May 2, 1961, published May 4, 1961 and recorded in Book 28 at Page 73 in the office of the recorder of deeds of Sarpy County, Nebraska, and said portion of West Crest St. remains a part of the City of Papillion.

*(End of p. 11A, Transcript)

EXHIBIT 4

(Of January 7, 1971 Decree above, continued)

5. Existing storm sewers, inlets and manholes in and under the paved streets pertinent hereto were constructed by the City of Papillion as a part of the paving districts, as a part of the project of paving the respective street and by the same contractor; except that storm sewer on Polk Street was constructed on Polk Street in 1962 just before the paving of Polk Street, there being two projects thereon—(and, the manholes for the sewer on Polk St. having been constructed as part of the sewer construction by the City of Papillion, and the inlets on Polk St. having been constructed by the City as a part of the paving construction on Polk St.). Paving of Polk St. over said storm sewer was also in 1962. As a part of said Storm sewer construction in Polk Street, the City of Papillion also replaced the East-West culvert in the South ditch on Lincoln Street at Harrison St.
6. As a part of the paving of the streets, the City of Papillion filled in the existing ditches on the sides of the streets, which ditches were part of said streets.
7. City of Papillion has accepted the paving, grading and curbing of the streets here involved as Districts, has accepted Sec. 1 of Polk St. from Perry St. to West Crest Road, and has accepted all storm sewer construction done within the Drainage area here involved.*

APPENDIX A-2

(Journal entry, District Court, Sarpy County, Nebraska, re p. 38, supra, of App. A-1)

And on the 18th day of February, 1971, there were proceedings had in said cause of action and which is recorded in Journal 42, page 431, and which is in words and figures as follows:

*(End of p. 11B, Transcript)

Case No. 8326

Woodrow Megel et al vs. City of Papillion, et al

This cause came on and Parties represented by counsel and Mr. and Mrs. Woodrow Megel present. In accordance with the meaning and intent of the findings and order of the Court the Decree entered on January 7, 1971 is hereby corrected and modified by inserting the word "not" before the word "foreseeable" in line 7, paragraph 8, on page 5 of said Decree.

Plaintiff's adduced evidence in support of their motion for new trial and arguments submitted by counsel on said motion for new trial filed by the plaintiffs and on the motion for new trial filed by the defendants and said motions taken under advisement by the Court.

/s/ Walter H. Smith, Judge*

APPENDIX A-3

(Judgment and Opinion, Nebraska Supreme Court)

And afterwards, to wit, on the 11th day of May, 1973, there was rendered by the Supreme Court of Nebraska and entered of record upon Journal A2 thereof, at page 269, a certain JUDGMENT in the words and figures following, to wit:**

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*(End of p. 12, Transcript)

**(End of p. 13, Transcript)

Journal Entry Page 269

Supreme Court of Nebraska September Term, A. D. 1973

May 11, 1973

Woodrow Megel, et al.,

Appellants,

v.

City of Papillion, et al.,

Appellees.

Appeal from the District Court for Sarpy County.

No. 38776.

This cause coming on to be heard upon appeal from the district court of Sarpy County, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error in the judgment of said district court finding the defendants not guilty of willful contempt and such judgment is reversed and the cause remanded for further proceedings in conformity with the opinion of this court this day filed herein, that all costs and expenses in both courts including a reasonable fee for the service of the plaintiff's attorneys are taxed to appellee; City of Papillion and appellants are allowed the sum of $1,000 attorney fee for the services of their attorney in this court; that appellants recover of and from appellees their costs herein expended, taxed at $——; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Boslaugh, Judge*

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*(End of p. 14, Transcript)

And on the same day, there was filed in the office of the Clerk of the Supreme Court of Nebraska a certain OPINION by said Court pursuant to which the preceding judgment was entered, which OPINION is in the words and figures following, to wit:*

MEGEL V. CITY OF PAPILLION

38776 Filed May 11, 1973.

1. A civil contempt proceeding has for its purpose the preservation and enforcement of the rights of private parties.

2. The failure to obey an order of the court made for the benefit of the opposing party is ordinarily a civil contempt, but the disobedience must be willful before it may be punished as a contempt.

3. If it is impossible to comply with the order of the court, the failure to comply is not willful.**

Heard before White, C. J., Spencer, Boslaugh, Smith, McCown, Newton, and Clinton, J J.

BOSLAUGH, J.

This is a civil contempt proceeding. The trial court found the evidence failed to show a willful disobedience or failure to comply with the judgment of the District Court and dismissed the action. The plaintiffs appeal.

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*(End of p. 15, Transcript)

**(End of p. 16, Transcript)

The plaintiffs are the owners of Tax Lots 7 and 8 which are adjacent to the City of Papillion, Nebraska. The lots lie to the north of Lincoln Street which runs along the north boundary of Papillion at that place. The old bed of Papillion Creek forms the north boundary of Lot 7 and a part of the north boundary of Lot 8. The Papillion Drainage Ditch is located farther to the north.

In 1962, the plaintiffs commenced an action against the City of Papillion and its mayor and councilmen to enjoin the defendants from diverting "drainage water" into and upon the property of the plaintiffs. This action resulted in a decree on January 7, 1971, enjoining the defendants "from in any way causing or permitting surface water from its streets, alleys and sewers * * * to flow in, upon, through or against any of the property of the plaintiffs * * * in a greater quantity than what would have reached the property by natural drainage." The decree also ordered the defendants to commence engineering studies forthwith and to construct facilities within 6 months to cause the surface waters to be disposed of other than through the property of the plaintiffs and "in a manner so that no damage be caused to the property of said plaintiffs and to said plaintiffs."*

Motions for a new trial were overruled on July 29, 1971. There was no appeal from the decree and it became final.

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*(End of p. 17, Transcript)

The application for an order to show cause was filed on October 14, 1971. The plaintiffs alleged the defendants had failed to comply with the decree and had authorized additional construction in the City of Papillion which had materially increased the flow of surface water across the plaintiffs' property.

The evidence in the original action is not before us but the record in this proceeding indicates that the natural drainage was to the east of the plaintiffs' property. The construction of street improvements and other structures by the City of Papillion now diverts surface waters upon and through the plaintiffs' property that would normally have drained across other property lying to the east.

A supplemental application to obtain a temporary order restraining the defendants from proceeding in eminent domain to obtain an easement across the plaintiffs' property was filed on December 20, 1971. A temporary restraining order was granted on that day.

The record shows without dispute that the defendants did not comply with the terms of the decree. The defendants had engineering studies made and preliminary plans prepared which contemplated construction of an improved drainage-way across a part of Lot 7. The defendants made some attempt to acquire an easement across Lot 7 by negotiation but were not successful. No facilities were constructed as required by the decree.*

A civil contempt proceeding has for its purpose the preservation and enforcement of the rights of private

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*(End of p. 18, Transcript)

parties. McFarland v. State, 165 Neb. 487, 86 N. W. 2d 182. The failure to obey an order of the court made for the benefit of the opposing party is ordinarily a civil contempt, but the disobedience must be willful before it may be punished as a contempt. Kasparek v. May, 174 Neb. 732, 119 N. W. 2d 512. If it is impossible to comply with the order of the court, the failure to comply is not willful. Hawthorne v. State, 45 Neb. 871, 64 N. W. 359.

The defendants do not attempt to justify their failure to comply with the decree of January 7, 1971, on the ground that compliance was impossible. The temporary restraining order obtained by the plaintiffs on December 20, 1971, prevented the defendants from proceeding after that date to condemn an easement across the property of the plaintiffs. There is no satisfactory explanation in the record as to their failure to comply with the decree before December 20, 1971. The defendants seem to have been more concerned with the expense involved in remedying the wrongful diversion of surface waters than in complying with the decree and affording the plaintiffs the relief to which they are entitled.

In Kasparek v. May, *supra*, a party who had employed consulting engineers and a contractor in an attempt to comply with a decree was held to be in contempt when the resulting construction failed to conform to the terms of the decree. As in the Kasparek case, the decree here required specific acts which have not been performed. We conclude that the record in this case supports a finding of willful contempt.*

*(End of p. 19, Transcript)

There are mitigating circumstances in this case which make it inappropriate to impose any penalty upon the defendants at this time other than the costs and expenses of this proceeding in both courts, including a reasonable fee for the services of the attorney for the plaintiffs.

There is an additional matter which requires consideration. The plaintiffs contend the decree of January 7, 1971, prevents the City of Papillion from acquiring an easement across the property of the plaintiffs for drainage purposes. Although there is language in the decree which lends support to such an interpretation, the pleadings show there was no issue before the District Court in the original action concerning the right of the city to acquire an easement. The District Court did not construe the decree as preventing the city from acquiring an easement. We conclude the city is not estopped by the decree of January 7, 1971, from proceeding in eminent domain to acquire an easement across the plaintiffs' property for drainage purposes.

The finding of the District Court that the defendants are not guilty of willful contempt is reversed and the cause remanded for further proceedings in conformity with this opinion. All costs and expenses in both courts, including a reasonable fee for the services of the plaintiffs' attorney, are taxed to the City of Papillion. The plaintiffs are allowed the sum of $1,000 for the services of their attorney in this court.

REVERSED AND REMANDED*

*(End of p. 20, Transcript)

APPENDIX A-4

(Order, Nebraska Supreme Court, Denying Rehearing)

And afterwards, to wit, on the 15th day of October, 1973, there was rendered by the Supreme Court of Nebraska and entered of record upon Journal A2 thereof, at page 512, a certain ORDER in the words and figures following, to wit:*

Journal Entry Page 512

Supreme Court of Nebraska September Term, A. D. 1973

October 15, 1973

Woodrow Megel, et al.,
Appellants,

v.

City of Papillion, et al.,
Appellees.

Appeal from the District Court for Sarpy County.

No. 38776.

This cause coming on to be heard upon motion of appellants for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.**

*(End of p. 21, Transcript)

**(End of p. 22, Transcript)

APPENDIX A-5

(Order, Nebraska Supreme Court, Staying Mandate)

And on the same day, there was rendered by the Supreme Court of Nebraska and entered of record upon Journal A2 thereof, at page 513, a certain ORDER in the words and figures following, to wit:*

Journal Entry Page 513

Supreme Court of Nebraska September Term, A.D. 1973

October 15, 1973

Woodrow Megel, et al.,
Appellants,

v.

City of Papillion, et al.,
Appellees.

Appeal from the District Court for Sarpy County

No. 38776

This cause coming on to be heard upon motion of appellants for stay of mandate was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and hereby is, sustained; and issuance of mandate is withheld until January 15, 1974.**

*(End of p. 23, Transcript)

**(End of p. 24, Transcript)

APPENDIX A-6

(Praecipe for Transcript of Nebraska Supreme Court)

And afterwards, to wit, on the 23rd day of October, 1973, there was filed in the office of the Clerk of the Supreme Court of Nebraska a certain PRAECIPE for record in the words and figures following to wit:*

General No. 38776

IN THE SUPREME COURT OF NEBRASKA

Woodrow Megel and Lola Megel,
Plaintiffs-Appellants,

vs.

City of Papillion, et al.,
Defendants-Appellees.

• • •

PRAECIPE

(Re Petition for a Writ of Certiorari to the Supreme Court of the United States)

TO THE CLERK OF SAID COURT:

Please issue Certified Copies of the following, for use in printing Petition for a Writ of Certiorari to the Supreme Court of the United States, and forward same to undersigned attorney:

1. Memorandum and Decree of the District Court of Sarpy County, Nebraska, of January 7, 1971, together with Exhibits thereof:

*(End of p. 25, Transcript)

2. Journal Entry of, on or about February 18, 1971, of the District Court of Sarpy County, Nebraska, correcting and modifying aforesaid Decree (which Journal Entry is believed shown at T97);

3. The Opinion and Decision of the Nebraska Supreme Court filed on or about May 11, 1973, in the above entitled case;

4. Order Overruling Motion of Appellants for Rehearing in the above entitled action, filed October 15, 1973;

5. Order of October 15, 1973 in the above entitled action staying issuance of Mandate to January 15, 1974.

Woodrow Megel and Lola Megel,
Plaintiffs-Appellants

By /s/ Bernard E. Vinardi, Attorney

1750 Woodmen Tower
Omaha, Nebraska 68102

Certificate of Mailing

Copy hereof duly mailed this 22nd day of October, 1973 to:

Mr. Eugene T. Atkinson, of Atkinson & Kelly, Attorneys
144 N. Washington, Papillion, Nebraska 68046

Mr. David S. Lathrop of Lathrop, Albrecht & Dolan, Attorneys
460 Continental Building, Omaha, Nebraska 68102

/s/ Bernard E. Vinardi, Attorney*

*(End of p. 26, Transcript)

APPENDIX A-7

(Certification of Nebraska Supreme Court Transcript)

STATE OF NEBRASKA, Lancaster County, ss.

I, George H. Turner, Clerk of the Supreme Court of Nebraska and custodian of the records and files thereof, do hereby certify that the foregoing pages, numbered 1 to 26, inclusive, are a true, full and complete transcript of all such parts of the record and proceedings in the case of MEGEL v. CITY OF PAPILLION NO. 38776 and also the Opinion of the Supreme Court rendered therein, as are mentioned and described in the praecipe for this record as the same now appear of record and on file in my office.

In Witness Whereof, I have hereunto set my hand and officially affixed the seal of the Supreme Court of Nebraska at my office, in Lincoln, Nebraska, this 25th day of October, 1973.

/s/ George H. Turner

Clerk, Supreme Court of Nebraska*

———o———

*(End of p. 27. Transcript)

APPENDIX B

NEBRASKA STATUTES ON FINALITY OF JUDGMENT AND DECREE

(re p. 7, supra)

"(1) A judgment is the final determination of the rights of the parties in an action.

(2) Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action.

(3) Entry of a judgment is the act of the clerk of the court in spreading the proceedings had and the relief granted or denied on the journal of the court."

Section 25-1301, R. R. S. 1943.

Reissue Revised Statutes of Nebraska of 1943.

"The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors under the criminal code, shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record, and, except as otherwise provided in section 29-2306, by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court. * * *"

Section 25-1912, R. R. S. 1943.

Reissue Revised Statutes of Nebraska of 1943.

APPENDIX C

(re p. 10, supra)

NEBRASKA CONSTITUTIONAL AND STATUTORY PROVISIONS REGARDING ENFORCEMENT OF DECREE OF COURT.

"All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and justice administered without denial or delay."

Article I, Section 13, Nebraska Constitution.

"An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, * * *. An attachment may be issued by the court or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same; * * *."

Section 25-1072, R. R. S. 1943.

"Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of (1) disorderly, contemptuous, or insolent behavior towards the court, or any of its officers in its presence; * * *; (3) willful disobedience of or resistance willfully offered to any lawful process or order of said court; (4) any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts; * * *."

Section 25-2121, R. R. S. 1943.

"Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense."

Section 25-2122, R. R. S. 1943.

"Persons punished for contempt under the preceding provisions shall nevertheless be liable to indictment, if such contempt shall amount to an indictable offense; but the court before which the conviction shall be had may, in determining the punishment take into consideration the punishment before inflicted in mitigation of the sentence."

Section 25-2123, R. R. S. 1943.

Note: The Court is not burdened with decisions under the above provisions. The District Court of Sarpy County, Nebraska and the Nebraska Supreme Court have acted based upon the procedure being due and proper.

———o———

APPENDIX D

(re pp. 13, 25, supra)

NEBRASKA STATUTE ON POWER TO CONDEMN

"19-709. *Property; acquisition for public use; purposes enumerated; procedure.* The mayor and city council of any city of the first or second class or the chairman and members of the board of trustees of any village shall have power to purchase or appropriate private property or school lands for the use of the city or village for streets, alleys, avenues, parks, parkways, boulevards, sanitary sewers, storm water sewers, public squares, public auditoriums, public fire stations, market places, public heating plants, power plants, gas works, electric light plants, wells or waterworks, including mains, pipe lines, and settling basins therefor, and to acquire outlets and the use of streams for sewage disposal. When *necessary* for the proper construction of any of the works above provided, the right of appropriation shall extend such distance as may be necessary from the corporate limits of the city or village. Such power shall also include the right to appropriate for any of the above purposes any plant or works already constructed, or any part thereof, whether the same lies wholly within the city or village or part within and part without the city or village or beyond the corporate limits of such city or village, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs, and all appurtenances reasonably necessary thereto and a part thereof, or connected with such works or plants, and all franchises to own and operate the same, if any. The procedure to condemn property

shall be exercised in the manner set forth in sections 76-704 to 76-724, except as to property specifically excluded by section 76-703 and as to which sections 19-701 to 19-707 are applicable.

Source: Laws 1901, c. 18, § 50, p. 268; Laws 1901, c. 18, § 52, p. 270; Laws 1901, c. 18, § 54, p. 272; Laws 1901, c. 19, § 5, p. 316; Laws 1907, c. 14, § 1, p. 121; Laws 1909, c. 19, § 1, p. 184; R. S. 1913, § 4904; C. S. 1922, § 4072; C. S. 1929, § 16-601; R. S. 1943, § 16-601; Laws 1951, c. 101, § 50, p. 464; Laws 1961, c. 44, § 1, p. 175; R. R. S. 1943, § 16-601; Laws 1963, c. 88, § 1, p. 297; Laws 1965, c. 81, § 1, p. 318; Laws 1967, c. 91, § 1, p. 281." (Emphasis added.)

Sec. 19-709, R. R. S. 1943 (Reissue of 1970, Nebraska Reissue Revised Statutes of 1943).

See also Sec. 19-709, R. S. Supp. 1972, Nebraska 1972, Cumulative Supplement, p. 235, for presently non-pertinent amendment effective August 27, 1971.

———o———

APPENDIX E

(re: p. 15, supra)

AN ACT OF GOD IS NO DEFENSE UNDER NEBRASKA LAW WHEN COMBINED WITH OTHER CONDUCT.

"An act of God must be the sole proximate cause of damages about which plaintiff complained without concurrent negligent participation of defendant, and in order for defendant to recover a verdict, he has the burden of proving such an alleged defense by a preponderance of the evidence." (Syl. 8)

"Where an act of God and the negligence of defendant concur in proximately causing damages, the defendant is liable as though the damages had been caused by his negligence alone." (Syl. 9)

Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661 (also at 167 Neb. 788, 95 N. W. 2d 117 and 173 Neb. 751, 115 N. W. 2d 133).

"In a suit for damages for personal injuries, an act of God is no defense if defendant's negligence was a concurrent cause of plaintiff's injuries." (Syl. 2)

Davis v. Union P. R. Co., 99 Neb. 769, 157 N. W. 964.

See also: *Snyder v. Farmers Irr. Dist.*, 157 Neb. 771, 779-780, 61 N. W. 2d 557, 561.

Note: This Appendix is for information purposes only (supporting statement at p. 15, supra), to show legal basis available to Respondents for assertion of error in the Decree of January 7, 1971 in denying them damages therein involved had Respondents appealed before the Decree became final. Respondents concede and accept the constitutional fact that the Decree is final and binding in toto as entered as to all parties, notwithstanding any then or subsequent desires of any party for some different provisions as to some part or parts of the Decree.

APPENDIX F

(re p. 15, supra)

NEBRASKA LAW ON DAMAGES IN EMINENT DOMAIN

"Where land of a private person is appropriated for a public use, such person is entitled to be compensated for the land actually appropriated; in addition thereto, he may recover any special damages he has suffered by way of diminution in value of the remainder of his land, less any special benefits received. General benefits, however, are not deductible." (Syl. 2)

Regouby v. Dawson County Irrigation Co., 126 Neb. 711, 254 N. W. 389.

"The *property* of no person shall be taken or damaged for public use without just compensation therefor." (Emphasis added.)

Sec. 21, Art. I, Constitution of the State of Nebraska.

"After the inspection, view, and hearing provided for in section 76-709 have been completed, the appraisers shall assess the damages that the condemnee has sustained or will sustain by the appropriation of the property to the use of the condemner, and make and file a report thereof in writing with the county judge. In assessing such damages in cases in which the appropriation consists of taking an easement, the assessment of damages shall include damages for fences and crops destroyed or damaged by reason of the original construction of the improvement. Damage to fencing and crops, occurring after the original construction and resulting from the operation or maintenance of the improvement, shall not be included in such assessment, but shall be de-

termined by agreement of the parties and paid to the owner or lessee by the condemner or its successors and assigns at the time such fencing or crops are damaged. Upon failure of the parties to agree, such damages may be determined in the same manner as provided under sections 76-701 to 76-724. A copy of the appraisers' report shall be transmitted to the condemnee."

* * *

Section 76-708, R. R. S. 1943 (Nebraska Reissue Revised Statutes of 1943).

APPENDIX G

(re p. 27, supra)

STATUTORY PROVISIONS FOR EQUAL RIGHTS

"Equal rights under the law

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U. S. C. Sec. 1981.

"Property rights of citizens

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

42 U. S. C. Sec. 1982.

"Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U. S. C. Sec. 1983.

"Same; review of proceedings

"All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court."

42 U. S. C. Sec. 1984.

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1973

No. 73-950

WOODROW MEGEL and LOLA MEGEL,
Petitioners,

vs.

CITY OF PAPILLION, LYNN LANDGREN, MAYOR, and ROBERT A. WALLACE, IDA MAE CHADWICH, LOUIS HAUSCHILD, JR., MAURICE MORAVEC, WILLIAM OLIVER, JR., FRANK ARNEY, FRANK SMITH, ALLEN RIBBE, COUNCILMEN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nebraska

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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PRIESMAN GRAPHICS — OMAHA, NEBRASKA

In the Supreme Court of the United States

October Term, 1973

No. _____

WOODROW MEGEL and LOLA MEGEL,
Petitioners,

vs.

CITY OF PAPILLION, LYNN LANDGREN, MAYOR, and ROBERT A. WALLACE, IDA MAE CHADWICH, LOUIS HAUSCHILD, JR., MAURICE MORAVEC, WILLIAM OLIVER, JR., FRANK ARNEY, FRANK SMITH, ALLEN RIBBE, COUNCILMEN,
Respondents.

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MEMORANDUM FOR RESPONDENTS IN OPPOSITION

1. Petitioners are the owners of a residential dwelling in the City of Papillion, Nebraska. Heretofore, certain surface water was discharged upon petitioners' property by the respondents.

2. Complex litigation in Nebraska trial courts determined that the discharge on petitioners' property by respondents was wrongful but that no damages were incurred.

3. The Nebraska trial court ordered that respondents:

> " . . . enjoined from in any way causing or permitting surface water from its streets, alleys, and sewers presently and hereafter constructed and from any street, alley and sewer hereafter annexed within the drainage area in which the property of the plaintiffs is situated, to flow in, upon, through or against any of the property of the plaintiffs . . . "

4. The City Council of Papillion, Nebraska, determined that the only feasible manner of correcting the water problem was to condemn the petitioners' property or a portion of it.

5. Petitioners had an ex parte restraining order entered restraining the City of Papillion from instituting condemnation.

6. The respondents are here complaining of the dissolution of the restraining order, asserting that to condemn rather than divert the water would be in violation of the trial Court decree ordering a cessation.

ARGUMENT

The City Council of the respondents has an obligation to the taxpayers of the City of Papillion, namely to correct the surface water problem in vicinity of petitioners' home in the most feasible and least expensive manner possible. In the judgment of this body the problem cannot be corrected consistent with this duty other than by condemnation. The situation is analogous to a school district, whose children play on the adjoining property of another. The neighbor obtains a restraining order to keep the

children off and ordering the school district to construct a fence. There being no other place for the children to play, the school district condemns the neighbors property for a playground.

No federal constitutional questions are presented and to the extent possible the petitioners' rights will be protected by the condemnation laws of the State of Nebraska properly supervised by the courts of Nebraska.

It is, therefore, submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-950

WOODROW MEGEL AND LOLA MEGEL,
Petitioners,

vs.

CITY OF PAPILLION, LYNN LANDGREN, MAYOR, AND ROBERT A. WALLACE, IDA MAE CHADWICH, LOUIS HAUSCHILD, JR., MAURICE MORAVEC, WILLIAM OLIVER, JR., FRANK ARNEY, FRANK SMITH, ALLEN RIBBE, COUNCILMEN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nebraska

REPLY OF PETITIONERS TO "MEMORANDUM FOR RESPONDENTS IN OPPOSITION"

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REPLY OF PETITIONERS TO "MEMORANDUM FOR RESPONDENTS IN OPPOSITION"

"Memorandum for Respondents in Opposition" is not supported by constitutional provisions and law as to any assertion of law, and it is also erroneous in statements of facts.

I. Respondents state: "Petitioners are the owners of *a residential dwelling in the City of Papillion* * * *" (#1, p. 1, their Memorandum in Opposition. Italics added). Two glaring errors exist in such statement:

a. The Decree of January 7, 1971 and the Opinion of the Nebraska Supreme Court both establish that Petitioners own Tax Lots 7 and 8 (Petition for Writ of Certiorari to the Supreme Court of Nebraska: par. 2 at p. 35, & p. 51). The facts are that the residence of Petitioners is on Tax Lot 7 as established by the evidence, and which is indicated in the Decree of January 7, 1971 in the finding regarding the "* * * rain on June 16, 1964, which damaged the property and residence of the Plaintiffs * * *, the residence being known as 314 West Lincoln Street * * *" (par. 8, p. 38, Petition for Certiorari herein). Respondents are not correct in submitting that there is "a residential dwelling" as being the property of the Petitioners.

b. Respondents state the property of Petitioners is "*in* the City of Papillion, Nebraska". Petitioners state "Their real estate *abuts* the City of Papillion" (p. 6, Petition for Writ of Certiorari herein). The correctness of Petitioners is in part established by:

1. The Decree of January 7, 1971 denied and dismissed with prejudice the Petition of the City of Papillion to *annex* said property of Petitioners (pars. 12 & D of Decree at pp. 40, 42, Petition for Writ of Certiorari herein).

2. The Opinion of the Supreme Court of Nebraska states "The plaintiffs are the owners of Tax Lots 7 & 8 which are *adjacent* to the City of Papillion, Nebraska" (p. 51, Petition for Writ of Certiorari herein. Italics added).

II. Respondents state (#2, p. 2, Memorandum for Respondents in Opposition) that "* * * trial courts determined that the discharge on Petitioners' property was wrongful but that no damages were incurred".

Respondents are in error in therein stating "* * * but that no damages were incurred" by Petitioners from the wrongful discharge of Respondents. Decree of January 7, 1971 finds and determines:

1. Generally for plaintiffs, now Petitioners, "except as to insufficient proof of dollar amount of damages" (par. 1, p. 35, Petition for Writ of Certiorari herein).

2. The construction and installation by Respondents during the period of 1950 to 1962 inclusive, gathers "* * * in large and unusual quantities * * *" the surface water and precipitates it upon the property of Petitioners and *in part finds it is Respondents'* "* * * *duty* * * * *to use ordinary care and all reasonable means to take care of the water it had accumulated and is accumulating* so as not to injure or damage the property of the plaintiffs * * * or interfere with said plaintiffs and their property * * *" (par. 5 at pp. 36-37, Petition for Writ of Certiorari herein). (Italics added.)

3. "That the evidence is insufficient for determination by the Court with any degree of accuracy the dollar amount of damages to the Plaintiffs * * * heretofore caused by such precipitation of surface water upon their property prior to the heavy rains of June 16, 1964 and at the evidence relative to the dollar amount

of damages of said plaintiffs was too conjectural, uncertain, speculative and remote and was not proved with reasonable certainty." (Par. 6, pp. 37-38, Petition for Writ of Certiorari herein).

4. "That competent evidence * * * does establish that the plaintiffs did sustain some continuing damages by surface water as the result of said construction and installation by and in behalf of the defendants * * *", and "* * * equity looks to the nature of the continuing damages inflicted * * *" (par. 7, p. 38, Petition for Writ of Certiorari herein).

5. "That the rain on June 16, 1964, which damaged the property and residence of the plaintiffs * * *" (par. 8, pp. 38-39, Petition for Writ of Certiorari herein).

6. Respondents "* * * should be ordered to construct or cause to be constructed suitable and appropriate facilities, improvements and outlets to cause the surface water to be disposed of in a manner other than upon, in or through the property of plaintiffs * * * and in a manner that no damage be caused to the property of said plaintiffs and to said plaintiffs * * *" (par. 11, pp. 39-40, Petition for Writ of Certiorari herein), and the Decree so Orders the Respondents (pars. B, E, pp. 42-43, Petition for Writ of Certiorari herein).

The Opinion of the Supreme Court of Nebraska states the Decree also orders Respondents "* * * to construct facilities within 6 months to cause the surface waters to be disposed of other than through the property

of Plaintiffs and 'in a manner so that no damage be caused to the property of said plaintiffs and of said plaintiffs' " and states "The plaintiffs alleged the defendants had failed to comply with the decree and had authorized additional construction in the City of Papillion which had materially increased the flow of surface water across the plaintiffs' property" (pp. 51-52, Petition for Writ of Certiorari herein).

It is clear error, contrary to facts and the adjudications, for Respondents to state "no damages were incurred" when Petitioners have been and continue to be damaged, but were denied specific damages sought as to any specific damages pleaded. Statement by Respondents in their #2 is unequivocally erroneous. (See **also** pp. 6-9 Petition for Certiorari herein.)

III. Respondents assert (#4, p. 2, their Memorandum) that "the City Council * * * determined that the only feasible manner of correcting the water problem was to condemn the Petitioners' property or a portion of it." Constitutional provisions and jurisprudence thereunder do not permit a City Council and its personnel to substitute their determination of "feasibility" or compliance when there is a binding and final Order and Decree of the duly constituted Court as to the duties, requirements and conduct required and ordered by the Court. Such substitution is anarchy and lack of due process prohibited by the Constitution of the United States, as well as by the Constitution of the State of Nebraska, presently not applied herein requiring the action and orders of this Court. In addition, such statement in the Memorandum

for Respondents is not in accord with the facts, nor in accord with the findings and determinations of the District Court or of the Supreme Court of Nebraska. If Respondents wished to question the Decree of January 7, 1971 as not "feasible" in their opinion, their duty was to appeal in due course of law, which they did not do, instead of accepting the Decree as final and binding upon them. Also, the evidence and facts do not support the statement of Respondents that "the only feasible" manner is as decided by the City Council. The Supreme Court of Nebraska in part states: "The defendants do not attempt to justify their failure to comply with the decree of January 7, 1971, on the ground that compliance was impossible. * * * There is no satisfactory explanation in the record as to their failure to comply with the Decree before December 20, 1971. The defendants seem to have been more concerned with the expense involved in remedying the wrongful diversion of surface waters than in complying with the decree and affording the plaintiffs the relief to which they are entitled." (Opinion of Supreme Court of Nebraska, at p. 53 of Petition for Writ of Certiorari herein). Testimony in the Bill of Exceptions before the Supreme Court of Nebraska by the representative of the consulting engineers of Respondents is that engineering-wise storm sewers can be constructed to carry the surface water away from and around Petitioners' property herein involved.

In ordering Respondents to construct the facilities as provided therein, the Decree establishes that the trial court's basis is "ordinary care and reasonable means" (#2, p. 3, supra).

The construction ordered by the Decree is judicially determined as feasible and appropriate, and constitutionally there may be no substitution of Judgment by Respondents as to the adjudicated and judicially binding requirements and orders of the Decree.

IV. Petitioners are before this Court for the constitutional violations in the failure of Nebraska Courts to enforce the binding and final Decree of January 7, 1971. Respondents fail to submit a single constitutional or legal reference in opposition to the established reasons and requirements which establish the imperative and essential necessity for consideration and determination of this matter by this Honorable Court as set forth in the Petition for Writ of Certiorari, and particularly as set forth in the nine Reasons for Allowing the Writ at pages 11 through 31 of said Petition for Writ of Certiorari and the relevant appendices.

Wherefore, the Petition for Writ of Certiorari herein and its prayer are by reference reiterated and submitted as applicable and controlling.

Respectfully submitted,

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